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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-439

LEHMAN BROTHERS, *Petitioner,*

v.

JACOB SCHEIN, MARVIN H. SCHEIN, ANTONE F. GREGORIO, *et al.* *Respondents.*

No. 73-440

BENJAMIN SIMON, *Petitioner, et al.,*

v.

JACOB SCHEIN and MARVIN H. SCHEIN, *Respondents.*

No. 73-495

INVESTORS DIVERSIFIED SERVICES, INC., INVESTORS VARIABLE PAYMENT FUND, INC. and IDS NEW DIMENSIONS FUND, INC., *Petitioners,*

v.

JACOB SCHEIN and MARVIN H. SCHEIN, *Respondents.*

INVESTORS DIVERSIFIED SERVICES, INC., *Petitioner,*

v.

ANTONE F. GREGORIO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Court of Appeals is reported at 478 F.2d 817 (2nd Cir. 1973). The opinion of the District Court is reported at 335 F. Supp. 329 (S.D.N.Y. 1971).

Jurisdiction

Defendants Lehman Brothers and Simon filed petitions for certiorari pursuant to 28 U.S.C. §1254(1) (Nos. 73-439 and 73-440 respectively) on September 6, 1973. The petition of defendants IDS, et al. (No. 73-495) was filed on September 17, 1973. This Court granted certiorari on December 3, 1973 with respect to all three petitions, limited to the following question:*

> "Did the Court of Appeals for the Second Circuit err in not certifying the question of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure? Fla. Stat. Ann. Sec. 25.032 (1961), Fla. App. Rules, R. 4.61 (1967)."

Question Presented

Did the Court of Appeals for the Second Circuit commit reversible error in this action based upon diversity jurisdiction in deciding a question of Florida common law rather than certifying the question to the Florida Supreme Court pursuant to Florida's optional certification procedure where

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* This Court denied petitioners' request that it review the merits of the decision below or whether the Court below violated the principles of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) in reaching its decision.

there were no "special circumstances" warranting abstention in this case and where the petitioners did not request certification or even suggest the possibility of certification until after they had received an adverse decision on the merits?

Statement of the Case

These actions are stockholder derivative actions in which federal jurisdiction is based upon diversity of citizenship. The cases present no federal questions. They were brought on behalf of Lum's Inc. (now known as Caesar's World, Inc. but hereinafter referred to as "Lum's"), a Florida corporation, and arise out of the defendants' alleged misuse of confidential corporate information.

The *Schein* action was commenced on September 24, 1971 in the Southern District of New York. The *Gregorio* action was commenced in the Northern District of Illinois on January 12, 1971 and was transferred by consent to the Southern District of New York on April 30, 1971. (App. 9a)

The complaints herein charge that in November 1969, Melvin Chasen, Chief Executive Officer of Lum's, publicly announced that Lum's would have earnings of between $1.00 and $1.10 per share for its fiscal year ending July 31, 1970. However, on or about January 5, 1970, by virtue of his position with Lum's, Chasen learned that his earlier projection of an earnings increase for the second quarter was in error and that Lum's earnings for the year would only be about 75 cents per share. On January 8, 1970, before he disclosed this information to the shareholders of Lum's or the public generally, Chasen, in breach of his fiduciary duties to Lum's and its shareholders, called Simon, an institutional stock salesman of Lehman Brothers, and divulged to him the confidential information concerning Lum's earn-

ings. Chasen also informed Simon that the disappointing earnings were caused by problems in Lum's restaurant division, lower franchise sales and disappointing results at Caesar's Palace, a Las Vegas hotel casino owned by Lum's. On that same day after the close of trading on the New York Stock Exchange, Simon called Sit, the portfolio manager of IDS New Dimensions Fund, Inc. ("Dimensions"), and relayed the information given him by Chasen, informing Sit of the confidential source of the information. Sit immediately made the confidential information and its source known to Jundt, a manager and analyst for Investors Variable Payment Fund, Inc. ("Investors"). Both Dimensions and Investors are mutual funds for which Investors Diversified Services, Inc. ("IDS") is the investment advisor and distributor.

Based upon the nature and importance of the confidential material information which they had received from Chasen by way of Simon, IDS, Sit and Jundt determined that Dimensions and Investors should immediately sell the 83,000 shares of Lum's owned by them.

The following morning, a Friday, when trading opened on the New York Stock Exchange, Dimensions sold 40,000 shares of Lum's and Investors sold 43,000 shares of Lum's on the Exchange at approximately $17.50 per share. Each thus disposed of its entire holdings in that stock while in possession of the aforesaid confidential information and with the knowledge that such information had not been disclosed to the public generally.

At approximately 1:30 p.m. on the same day, the New York Stock Exchange halted trading in Lum's shares in anticipation of a company announcement. The announcement was made at 2:45 p.m. and contained substantially the same information that Chasen had leaked on January

8. Trading in Lum's was delayed until Monday morning, January 12, and the opening price was down over three and one-half points from the prices Dimensions and Investors received on January 9.

The complaints charge that by reason of the foregoing, the defendants participated in or aided and abetted the breach of a fiduciary duty to Lum's and that said defendants are jointly and severally liable to Lum's for all profits made by any of them as a result thereof.

Since federal jurisdiction in this case is based upon diversity of citizenship, the New York federal courts were required to decide the case as the New York State courts would have. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Since Lum's is a Florida corporation, the federal courts, under the rule of *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), were required to look to New York's choice of law rules to determine which law would apply to the situation at hand. In this case Florida law governed.

The District Court (Tyler, J.), finding that there were no Florida cases which had previously dealt with the specific issues in this case, and concluding that the decision in *Diamond* v. *Oreamuno*, 24 N.Y. 2d 494, 248 N.E. 2d 910, 301 N.Y.S. 2d 78 (1969), was not applicable to the issues herein, granted defendants' motion to dismiss pursuant to FRCP 12(b)(6) for failure to state a claim upon which relief can be granted. (App. 58a)

The Court of Appeals for the Second Circuit reversed, holding that the complaints alleged a valid claim under applicable state law. In reaching its decision, the Court of Appeals clearly recognized that its function was to decide the case on the basis of Florida law. (App. 66a) In determining the law of Florida, the Court noted that:

> "• • • in the absence of a clearly enunciated state rule, the federal court may turn to the law of other jurisdic-

tions for assistance in determining how the state court would most likely decide the case if the state court were presented with the questions being litigated in the federal court." *Baxter* v. *Lancer Industries, Inc.*, 213 F. Supp. 92 (EDNY 1963), app. denied, 324 F.2d 286 (2 Cir. 1963); *Locke Manufacturing Companies* v. *United States*, 237 F. Supp. 80 (D. Conn. 1964). (App. 66a)

Since the Florida courts had never faced the precise issues which were present in this action, the Court of Appeals concluded that it was:

"* * * both proper and practical for this court to turn for guidance to the body of law of other jurisdictions and particularly to that of New York where the resolution of the issues in the *Diamond* case, decided by the New York Court of Appeals, bears on the issues in the case before us. In doing so, our objective is to interpret *Diamond* as the Florida court would probably interpret it and to apply *Diamond*, as so interpreted, to the facts presented here." (App. 66a-67a)

The Court of Appeals then discussed *Diamond*, which specifically upheld the right of a corporation to recover profits realized by corporate officials who trade on the basis of confidential corporate information, and considered whether the rationale of *Diamond*:

"* * * should extend to reach third parties who, though not officers or directors of the injured corporation, are involved with directors in a common enterprise to misuse confidential corporate information for their own enrichment." (App. 67a)

The Court of Appeals concluded:

"As a court of equity viewing the case as the Florida court would probably view it, we cannot agree that the

'stretch' of *Diamond* does not reach the defendants in this case. We find nothing in the language of *Diamond* to suggest that co-venturers of the director who breaches his duty should not be subject to the same liabilities as those of the director himself for the misuse of corporate information." (App. 68a)

In passing, the Court of Appeals observed that:

"'* * * it would be self-defeating to limit the reach of *Diamond* to directors and officers of the injured corporation who have so acted while permitting third-party co-venturers of theirs to escape liability to the corporation.

* * * To immunize such third parties from liability to the damaged corporation would encourage insider 'leaks' to outside friends and would defeat *Diamond's* purpose and effect." (App. 69a)

The Court of Appeals noted that its interpretation of *Diamond* and the application of the rationale of *Diamond* to the issues in the instant case were in accord with other authorities:

"Indeed, the general rule has always been that 'one who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary.' *Oil & Gas Ventures—First 1958 Fund Ltd.* v. *Kung*, 250 F.Supp. 744 (1966); see, *e.g.*, *Jackson* v. *Smith*, 254 U.S. 586, 589 (1921); *Sexton* v. *Sword S.S. Line Inc.*, 118 F.2d 708, 711 (2 Cir. 1941); *Bankers Life and Casualty Co.* v. *Kirtley*, 338 F.2d 1006, 1013 (8 Cir. 1964)." (App. 68a)

The Court of Appeals also noted that its conclusion that a valid claim was stated against the defendants in this case

was supported by Florida case law dealing with the duty of a fiduciary to his *cestui*:

> "Our view that all the participants in the common enterprise must assume the same risks of liability to the corporation as the offending director is supported by Florida case law dealing with the duty of a fiduciary to his cestui. The Florida courts have held that the duty of a fiduciary not to misuse the property of his cestui extends not only to the 'technical fiduciary' but also to others who are placed in a position of trust. *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927). The confidential relationship of a fiduciary as that relationship is spelled out in Florida law extends not only to 'technical fiduciaries' but also to others who become 'fiduciaries' through the acquisition of confidential information which is 'owned' by someone else. See *Quinn* v. *Phipps*, *supra* at 420-421. When the defendants received their 'tip' from Chasen, they were automatically clothed with a duty to Lum's not to use the information for their own selfish advantages." (App. 70a)

Finally, the Court of Appeals rejected the arguments by Lehman Bros. and Simon that the complaints failed to state a valid claim against them because they had not personally profited by trading in Lum's stock and that they held no profits as constructive trustees of Lum's:

> "* * * Lehman Brothers and Simon obviously misused inside information as much as Diversified and Investors misused it, and therefore we fail to see how equity would be furthered by imposing liability only on the Funds and not on the other participants who supplied the Funds with the inside information. It is well established that the liabilities of persons engaged in a joint enterprise to commit a wrong are both joint

and several liabilities and each participant is liable to account for the profits of the other participants. *Marcus* v. *Otis*, 168 F.2d 649 (2 Cir. 1948), *modified*, 169 F.2d 148 (2 Cir. 1948); *Solomon* v. *United States*, 276 F.2d 669 (6 Cir. 1960), *cert. denied*, 364 U.S. 890 (1960), *reh. denied*, 364 U.S. 939 (1961). Accordingly, we hold that it would be proper to hold Lehman Brothers and Simon just as accountable for the profits made by their tippees Diversified and Investors as the tippees themselves.*" (App. 71a-72a)

Judge Kaufman dissented, disagreeing with the majority of the Court of Appeals in the interpretation of *Diamond* and in the application of the rationale of *Diamond* to the facts in this case. While Judge Kaufman expressed the view that the complaints did not state a valid claim against the defendants, he cited no Florida cases (or any other cases) in support of his dissenting opinion. In the last paragraph of his dissent Judge Kaufman added that the Court should have certified the issue to the Supreme Court of Florida. (App. 80a-81a)

The issues in this case were fully briefed and argued by the parties to the Court of Appeals. The petitioners did not request or even suggest in any way prior to the decision by the Court of Appeals that the question of state law in this case should not be decided by the Court of Appeals, but rather should be certified to the Supreme Court of Florida, pursuant to the optional procedures set forth in FSA §25.031 and the accompanying rules. Use of the certification procedure was suggested for the first time in Judge Kaufman's dissent.

Petitioners moved in the Court of Appeals for a rehearing. However, even in their petitions for rehearing, the

* Footnote omitted.

petitioners did not specifically request certification, but rather asked for a rehearing *en banc* on the merits. Only if the Court of Appeals was unwilling to decide in petitioners' favor, did they suggest that the issue be certified to the Florida Supreme Court.*

Summary of Argument

A federal court may abstain from deciding a question of state law in a diversity case only in narrowly limited "special circumstances". Such "special circumstances" exist only in cases (1) where a federal constitutional issue may be avoided or modified by a state court determination of state law or (2) on grounds of comity with the State, where the determination of state law involves a state regulatory scheme or other activities of state government and calls for interpretation of state regulatory statutes relating thereto; or where the state issue involves a peculiarly local matter such as the power of eminent domain or the control of natural resources within the border of the State.

The instant case, which involves the question of whether the petitioners are liable to Lum's under Florida common law for the profits made by any of them as a result of the alleged misuse of confidential corporate information, does not present any of the classic conflicts or "special circumstances" which have been held to warrant abstention. The petitioners' contention that abstention is required in any diversity case where there is an unsettled question of state law is without merit and has been repeatedly rejected by this Court.

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* Petition For Rehearing With A Suggestion For Rehearing In Banc filed by Petitioner IDS in the Court of Appeals on May 24, 1973; Suggestion For Rehearing In Banc Filed by Petitioner Lehman Brothers in the Court of Appeals on May 24, 1973.

Petitioners' argument that even if abstention was improper in this case, certification pursant to the Florida certification statute was not only proper, but was required in this case is equally unfounded. Certification is a form of abstention which is not appropriate where there are no "special circumstances" which would warrant a federal court in abstaining from a decision on a question of state law in a diversity case.

While certification may lessen somewhat the burdens which result from abstention, it clearly does not eliminate them. The certification procedure still entails substantial delay and added expense. The respondents should not be required to bear these extra burdens in this case simply because there are unsettled questions of state law involved and petitioners, having received an adverse decision on these issues in the Court below, now contend that these issues should be referred to the Florida Supreme Court so that they can have another opportunity to litigate them. It would seriously undermine diversity jurisdiction if certification were required, as petitioners urge, in every diversity case where there is an unsettled question of state law.

Assuming *arguendo* that the Court below had some discretion in determining whether to certify the issue of state law in this case, there was clearly no abuse of discretion by the Court below in not certifying the the question since there were no "special circumstances" present which warranted abstention, the parties had argued the merits of the case to the Court of Appeals and the petitioners did not even raise the possibility of using certification until *after* they had received an adverse decision on the merits.

Moreover, we submit that the petitioners waived their right to object to the fact that the question of state law in this case was not certified to the Florida Supreme Court

since, as we have noted, they did not ask the Court below to certify the question. On the contrary, they argued the merits of the case to the Court and, in effect, asked the Court of Appeals to decide the case. Under these circumstances, they should not now be heard to complain that the Court below did what they urged it to do and decided the case on the merits without certification.

ARGUMENT

The Court of Appeals Did Not Err in Not Certifying the Issue of Florida Common Law in This Case to the Florida Supreme Court Since There Were No Special Circumstances Warranting Abstention and the Petitioners Did Not Request Certification Or Even Suggest the Possibility of Certification Until After They Had Received an Adverse Decision on the Merits.

The petitioners herein contend that the Court of Appeals for the Second Circuit erred in deciding the issue of Florida common law in this case instead of certifying the question to the Florida Supreme Court as permitted by FSA §25.031 and the accompanying Court rules, notwithstanding the fact that the petitioners had argued the merits of the case to the Court of Appeals and had not requested certification. In short, petitioners, once confident of success and quite willing to have the Court below determine the applicable state law, have changed their view in the face of an adverse decision on the merits. Having raised the Florida certification procedure for the first time in their petitions for a rehearing in the Court below, they now ask this Court to reverse the decision below and give them a second chance.

A. This Was Not a Proper Case for Abstention.

The basic rule governing the obligation of federal courts to decide questions of state law in actions based upon diversity jurisdiction was set forth by this Court in *Meredith* v. *City of Winter Haven*, 320 U.S. 228 (1943), where this Court said:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. (Citations omitted.) When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." 320 U.S. at 234-35.

This Court further observed in *Meredith* that:

> "Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesi-

tated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. (Citations omitted.) Even though our decisions could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication." 320 U.S. at 237-38.

The principles set forth in *Meredith* have been reaffirmed by this Court on several occasions. Thus, in *Propper* v. *Clark*, 337 U.S. 472 (1949), this Court said:

> "We have refused in a diversity of citizenship case to allow the difficulty of an issue of state law to deter us from exercising our jurisdiction when federal determination was subject to equitable discretion and the state issue was the only one in the case. Meredith v. Winter Haven, 320 U.S. 228. To refrain from deciding it, we there said, would be to enervate diversity jurisdiction." 337 U.S. at 489-490.

Again, in *McNeese* v. *Board of Education for Community Unit School District 187*, 373 U.S. 668 (1963), this Court noted:

> "* * * Yet where Congress creates a head of federal jurisdiction which entails a responsibility to ad-

judicate the claim on the basis of state law, *viz.*, diversity of citizenship, as was true in Meredith v. Winter Haven, 320 U.S. 228, we hold that difficulties and perplexities of state law are no reason for referral of the problem to the state court:

'We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.'" 373 U.S. at 673 n.5.

In *Meredith*, this Court indicated that only where there are "exceptional circumstances" present, may a federal court be justified in abstaining from deciding a question of state law in a diversity case. In subsequent cases, this Court reaffirmed the principle that abstention is proper only in narrowly limited "special circumstances". In *Lake Carriers Association* v. *McMullan*, 406 U.S. 498 (1972), this Court said:

"Abstention is a 'judge-made doctrine . . ., first fashioned in 1941 in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 [that] sanctions . . . escape [from immediate decision] only in narrowly limited "special circumstances," Propper v. Clark, 337 U.S. 472, 492.' Zwickler v. Koota, 389 U.S. 241, 248

(1967), justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' England v. Louisiana State Board Medical Examiners, 375 U.S. 411, 418 (1964)." 406 U.S. at 509.

Such "special circumstances" have been found only in cases (1) where a federal constitutional issue may be avoided or modified by a state court determination of state law, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168 (1942); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101 (1944); *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960); or (2) on grounds of comity with the State, where the determination of state law involved a complex State regulatory scheme and called for a first interpretation of City or State regulatory statutes, *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U.S. 341 (1951); *City of Chicago* v. *Fieldcrest Dairies, Inc., supra*, or where the federal determination would disrupt a state administrative process, *Burford* v. *Sun Oil Co., supra*, interfere with the collection of state taxes, *Toomer* v. *Witsell*, 334 U.S. 385 (1948), or create needless friction by enjoining State officials from executing domestic policies, *Alabama Public Service Commission* v. *Southern R. Co., supra*, and finally, where the state issue involved a peculiarly local matter such as the power of eminent domain, *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959); *Martin* v. *Creasy*, 360 U.S. 219 (1959), the land law of a State, *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940) (a non-diversity case), or a determination of whether a State, where water is one of its most valuable natural resources, could, under its own Constitution, condemn private land to secure water for private business, *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968).

It is clear that neither of the two recognized situations which justify a federal court in abstaining from deciding a question of state law in diversity cases is present in the instant case. First, there is no federal constitutional question involved in this case. Second, the state law question in this case does not involve any State or City regulatory scheme or the interpretation of any statutes relating thereto; no injunctive relief has been sought which would prohibit State officials from executing State domestic policy, and finally this case does not involve a peculiarly local matter such as the power of eminent domain or the regulation of natural resources within the border of the State.

The issue in this case is simply whether petitioners, based upon the allegations of the complaint herein, are liable to Lum's under Florida common law for the profits made by any of them as a result of the alleged misuse of confidential corporate information.

In a vain effort to qualify this case as a proper abstention case, the petitioners repeatedly assert in their briefs that the determination of this question involves a determination of "fundamental public policy" of Florida and thus the federal court should have abstained from deciding the issues in this case so as to not interfere with said public policy. The petitioners, however, fail to show how the determination of the issue in this case is any more a matter of Florida public policy than the determination of other questions involving the alleged breach of fiduciary obligations to Florida corporations. Nor, indeed, do the petitioners show how this case involves Florida public policy any more than a case involving the determination of important principles of contract law covering Florida contracts or the determination of standards of due care which may be applicable to negligence actions. Indeed, it is likely that the determination of the issue of state

law in this case is of considerably less importance to Florida public policy than the determination of many other questions of corporate, contract and negligence law which will more directly control the conduct and welfare of persons in the State of Florida.

The issue in this case does not involve (as is commonly the case where abstention has been granted) whether certain conduct within a State is proper. The petitioners' conduct in this case was neither peculiarly local in nature* nor subject only to Florida law. Trading with confidential corporate information also constitutes a violation of the federal securities laws and may subject the violator to liability in an action brought by a private investor or by the Securities and Exchange Commission.**

Thus, the main issue in this case is not the propriety of petitioners' conduct, but rather whether Lum's has a remedy under Florida common law to recover the profits made by petitioners as a result of their alleged misuse of confidential corporate information. The petitioners nowhere show how it will interfere with the public policy of Florida if petitioners are held liable to Lum's for these profits.

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* The alleged improper conduct by petitioners Simon and Lehman Bros. took place in Chicago, Illinois, while petitioner IDS was located in Minnesota.

** See *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (2nd Cir. 1968), *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 95 (S.D.N.Y. 1970), modified on appeal 446 F. 2d 1301 (2nd Cir. 1971), cert. denied 404 U.S. 1005 (1971), rehearing denied 404 U.S. 1064 (1972); *Ross* v. *Licht*, 263 F. Supp. 395 (S.D.N.Y. 1967). In an action brought by the Securities and Exchange Commission based upon the conduct involved in this case, petitioners Simon and IDS consented to the entry of judgments of permanent injunction. Lehman Bros. was found by the District Court, in said action, to have not violated the federal securities laws on the ground that they were not responsible for the actions of petitioner Simon. See *S.E.C.* v. *Lum's, Inc.*, 365 F. Supp. 1046 (S.D.N.Y. 1973).

Surely, it cannot be seriously urged that it is the public policy of Florida that persons should be permitted to engage in trading with confidential corporate information in the stock of Florida corporations and that the decision in this case will interfere with that public policy.*

Petitioners also contend that the determination of the issue in this case "will affect numerous persons with different interests in Florida corporations" (Lehman Bros. Brief, p. 36). However, again petitioners completely fail to support their contention or to show how this justifies abstention in this case. Since, as we have noted, the conduct involved in this case is already subject to the federal securities laws, the determination in this case will probably have considerably less impact on persons with interests in Florida corporations than would many other decisions involving breaches of fiduciary obligations to Florida corporations which are not subject to federal law. Furthermore, as noted above, the determination of state law in this case will probably have less effect upon persons in Florida than the determination of many important principles of contract or tort law.

The petitioners' contention that the Court below decided that "the public policy of Florida requires the encouragement of this new type of derivative lawsuit, and places a lower priority on recovery by victims of unfairness", is totally unfounded. No such determination was made by the Court of Appeals.** It simply decided that in this case,

* Even Judge Kaufman in his dissent said that "[i]n my view, it is no longer debatable that trading on inside information merits *universal condemnation*." (emphasis supplied) (App. 73a).

** The decision of the Court below clearly does not affect, nor does it purport to, the rights of individual investors to recover damages for violations of the federal securities laws, nor does it affect the right of the SEC to bring appropriate actions on their behalf.

based on the facts alleged herein, Lum's would have a right under Florida common law to recover the profits made by the petitioners.

Thus, it is apparent that this case does not present any of the classic conflicts, or "special circumstances" which have led this Court to sanction abstention. No doubt recognizing this fact, petitioners argue broadly that abstention is required in any case where there is an unsettled question of state law.* This contention, however, was specifically rejected by this Court in *Meredith*, where this Court stated that abstention is not proper "merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest Court of the State". 320 U.S. at 234-35. See also *McNeese* v. *Board of Education, supra.***

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* The petitioners also argue at great length in their briefs that the decision below was wrong and that the Court below did not follow the principles of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), in deciding the issues of state law in the case, notwithstanding the fact that this Court denied the petitioners' application to review these matters. Since the merits of the decision below are not before this Court, we do not believe that the petitioners' arguments on these points warrant an extended response. Suffice it to say that an examination of the decision below clearly shows that the Court of Appeals scrupulously performed its duty under *Erie* and that the Court's decision is well founded.

** Petitioners assert that notwithstanding *Meredith*, abstention was required in this case because there was a "complete absence of state decisional law", rather than merely a difficulty in legal analysis. Petitioners, however, in fact argue in their briefs that the Court below failed in its legal analysis of certain Florida decisions bearing upon the issue in question such as *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927) and *Palma* v. *Zerbey*, 189 So. 2d 510 (Fla. App. 1966), *cert. denied* 200 So. 2d 814 (Fla. 1967), which were cited in the Court below and also in failing to properly consider certain other Florida cases, *Doeg* v. *Thornton*, 174 So. 2d 570 (Fla. App. 1965), *Renpak, Inc.* v. *Oppenheimer*, 104 So. 2d 642 (Fla. App. 1958) and *Etheredge* v. *Barrow*, 102 So. 2d 660 (Fla. App. 1958), none of which were cited by petitioners in their briefs in the court below. Thus, while petitioners suggest

Acceptance of the petitioners' argument that abstention is required in any case involving an unsettled issue of state law would as this Court said in *Meredith*, "thwart the purpose of the jurisdictional act" and would enervate diversity jurisdiction". *Propper* v. *Clark, supra* at 489-490.

B. Since Abstention Was Not Warranted in This Case, Certification Would Not Have Been Appropriate.

Defendants argue that even if abstention would be improper, nevertheless certification of the question pursuant to the Florida certification statute would be proper and that failure to certify the question in this case constituted error by the Court below.

Certification, however, is a form of abstention. By certifying the question, the federal court abdicates its responsibility to decide the issue of state law in a diversity case as required by this Court in *Meredith*. Thus, while certification may be preferable to outright dismissal of the federal action as a form of abstention, the question remains whether it is proper for the federal court to abstain at all from deciding the issue of state law and to submit the question to the state court for decision. Since certification is a form of abstention, it should not be sanctioned in the absence of "special circumstances" which would warrant the federal court abstaining from deciding the question of state law in a diversity case. In *Propper* v. *Clark, supra*, this Court indicated that a federal court should not submit questions of state law to a

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that there was a complete absence of state decisional law bearing upon the issue in question, they in fact argue that the court below failed in its legal analysis of certain relevant Florida decisions. In any event, the obligation of the federal court to determine issues of state law in a diversity case, as set forth in *Meredith*, should not depend upon so ephemeral a distinction.

state court where federal courts have been granted jurisdiction of the controversy in the absence of "special circumstances" which would justify abstention. Thus, this Court said:

> "Erie R. Co. v. Tompkins, 304 U.S. 64, a common-law case, is itself a precedent against any general ruling that cases properly in the federal courts that depend upon state law should have that issue submitted to state courts for decision.
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> The submission of special issues is a useful device in judicial administration in such circumstances as existed in the Magnolia, Spector, Fieldcrest and Pullman cases, supra, but in the absence of special circumstances, 320 U.S. at page 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy.
>
> We reject the suggestion that a decision in this case in the federal courts should be delayed until the courts of New York have settled the issue of state law." 337 U.S. at 490-91.

Petitioners' reliance upon *Clay* v. *Sun Insurance Office, Ltd., supra,* in support of their contention that certification is proper even in the absence of "special circumstances" which would justify abstention is clearly misplaced. *Clay* reached this Court because the Court of Appeals for the Fifth Circuit had unnecessarily decided a federal constitutional question in a case which might have otherwise turned entirely on an issue of state law. In vacating the decision, this Court remanded the case to the Court of Appeals for a determination of the rele-

vant state law with the suggestion that the Court use the Florida certification procedure.* Thus, *Clay* involved a classic example of abstention where a determination of state law might avoid or modify a constitutional question.**

Petitioners' reliance on *Dresner* v. *City of Tallahassee*, 375 U.S. 136 (1963) and *Aldrich* v. *Aldrich*, 375 U.S. 75 (1963) in support of their contention that certification is proper in any diversity case where there is an unsettled question of state law is also misplaced. Neither of these cases were diversity actions. *Dresner* was a Florida state court case in which this Court in an exercise of discretion certified doubtful questions of state law to the Florida Supreme Court since the resolution of these state law questions might obviate the need for this Court to determine the constitutional issues involved. *Aldrich* arose in the West Virginia State Courts and was concerned with the effect to be given to a Florida judgment under the full faith and credit clause. These cases obviously lend no support to the suggestion that lower federal courts sitting in diversity jurisdiction are *obligated* to certify unsettled questions of state law to the Florida Supreme Court when

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* In strongly suggesting, but not explicitly mandating use of the Florida certification procedure, this Court took particular note of the fact that the Court of Appeals for the Fifth Circuit had admitted that "it could not on the available materials make a confident guess how the Florida Supreme Court would construe the statute". 363 U.S. at 212. The case at bar sharply contrasts with *Clay*. First, there is no federal constitutional question involved and therefore no possibility of an unnecessary constitutional adjudication. Second, the Court of Appeals in the instant case did not express an inability to determine the state law question at issue and in fact determined it in a carefully reasoned opinion.

** In *Zwickler* v. *Koota*, 389 U.S. 241 (1967), this Court referred to *Clay* as an example of a diversity case in which "special circumstances" were found which warranted abstention. 389 U.S. at 249 n.11.

no "special circumstances" are present and where none of the parties request such certification.

The cases in which the Court of Appeals for the Fifth Circuit has utilized the Florida certification procedure are equally unavailing to support petitioners' contention that certification is proper in the absence of "special circumstances". The Fifth Circuit cases which have utilized this procedure have typically involved a consented stipulation framing the question to be certified, see e.g. *A. R. Moyer, Inc.* v. *Graham*, 443 F. 2d 434 (5th Cir. 1971) and in only one of the Fifth Circuit cases cited by the petitioners does it appear that any opposition was raised to certification.*

Petitioners also argue that certification may be used in any diversity case where there are unsettled issues of state law because Florida by enacting a certification statute has evidenced a public policy to have such issues decided by the Florida Supreme Court rather than by a federal court in a diversity action. In passing, it should be noted that the Florida certification statute merely provides that the federal court "may" certify such questions to the Florida Supreme Court and, of course, does not purport to require the federal court to do so. The simple answer, however, to petitioners' argument is that the State of Florida cannot by enacting a certification statute, take away the rights

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* In *National Education Association* v. *Lee County Bd. of Public Instruction*, 448 F. 2d 451 (5th Cir., 1971) one of the parties raised some objection to certification. However, as indicated by the Court, he did not press his objection. The Fifth Circuit cases cited by the petitioners certainly do not support the contention herein asserted, that certification is proper in the absence of both "special circumstances" and the consent of the parties. Moreover, as we shall show, the Fifth Circuit regards the use of the Florida certification procedure as purely discretionary. Thus, these cases lend no support to petitioners' contention that the Court below, in not certifying the question in this case where there were no "special circumstances" and where none of the parties requested certification, committed reversible error.

granted to litigants under federal law to have their claims decided in federal court in diversity cases. The question of whether abstention by certification is proper in a diversity case is governed by federal law and by the principles set forth by this Court in *Meredith* and in other cases involving the abstention doctrine.

In his well-known treatise on the federal courts, Professor Wright specifically cautions against permitting the kind of expansive use of certification urged by the petitioners herein:

> "The availability of a certification procedure may tempt a federal court to abstain by certification where there is no justification for abstention, except that the state question is difficult.
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> • • • certification is an undesirable innovation if it will lead to abrogation of the *Meredith* doctrine. If a federal court must defer to the state court whenever a state issue in a case is difficult, the federal judiciary will no longer be able to function as a court. Such an extension of abstention would justify the reference by Judge Charles E. Clark to 'that wilful, perhaps even illegitimate, child of the Erie-Tompkins Rule, namely the 'abstention doctrine'". Wright, *Federal Courts*, § 52 (1963 ed.)

Similar expressions concerning the use of certification are found in other commentaries which have addressed themselves to this question.

> "However it must be remembered that this procedure can be used only in those cases which require the operation of abstention and *not in all cases involving issues*

of uncertain state law." (Emphasis supplied by the author) Note, 16 Miami L. Rev. 413, 433 (1962).

In Gowan & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 Tex. L. Rev. 194 (1964), which is cited by petitioners, the author states, at p. 209:

> "If the underlying rationale of *Meredith* is that federal courts may not abnegate their jurisdiction to decide, in a diversity case, issues involving difficult questions of state law, it seems clear that they cannot abstain by invoking the certification procedure and then hold that they are bound under the theory of the law of the case. The parties are entitled to have state issues litigated in a federal court and decided by federal court; this in effect is the essence of diversity—of—citizenship jurisdiction".

In Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. Miami L. Rev. 717 (1969), the author also warns of the danger of an improper use of certification by the federal courts:

> "The availability of a certification procedure has resulted in the federal courts forgetting the teaching of *Meredith* v. *City of Winter Haven*, and using the procedure merely to solve difficult questions of state law.
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> * * * That restriction of the use of certification to exceptional situations is desirable is borne out by the fact that the recent use of certification has exacted too high a price for theoretically correct answers to *Erie*-posed problems". 23 U. Miami L. Rev. at 729-30, 735.

While certification may lessen somewhat the burdens which result from abstention, it hardly eliminates them. There will still be substantial delay and additional expense as a result of certification. This delay has been more than one year in most of the cases where the procedure has been used in Florida. Mattis, *supra,* 23 U. Miami L.Rev. at 726.*

The delay involved in certification is even more pronounced where, as in the instant case, the petitioners did not even suggest the possibility of certification until *after* the Court below had rendered an adverse decision on the merits. Even then, petitioners did not specifically request certification, but rather asked for a rehearing *en banc* on the merits. Only if the Court below was unwilling to decide in petitioners' favor did the petitioners suggest that the question be certified.**

The certification procedure not only results in substantial delay, but also makes the litigation substantially more expensive. We submit that the respondents should not be required to bear these extra burdens simply because there are unsettled issues of state law in this case*** and the

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* The Florida certification procedure involves a full-dress appeal. In addition, before certification can take place, the certified question must be formulated, which frequently involves additional delay. Thus, where certification is used:

> "In effect, two appeals are created where only one existed before. This concept of two for one might be desirable in growing stalks of wheat, but its value is negative in the field of legal appeals." Mattis, *supra,* 23 U. Miami L. Rev. at 728.

** In the instant case, the Court of Appeals finally issued its mandate, after denying petitioners' applications for rehearing, approximately 17 months after notice of appeal was filed. (App. 8a).

*** If the Court below were now required to certify the issues raised by petitioners' motions to dismiss the complaints herein, it might also be required to subsequently certify the question of whether the plaintiffs proved a violation of Florida common law (since the proof adduced at trial might vary from the allegations of the complaints). Thus, if certification is required in this case.

petitioners, having received an adverse decision on these issues in the Court below, now contend that these issues should be referred to the Florida Supreme Court so that they can have another opportunity to litigate them.

In *Clay* v. *Sun Insurance Office Ltd., supra,* (dissenting opinion), Mr. Justice Douglas made the following cogent remarks:

> "• • • I desire to give renewed protest to our practice of making litigants travel a long, expensive road in order to obtain justice.
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> "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act."

The petitioners seem to suggest that this Court should disregard the fact that there would be substantial delay and added expense if certification were required in this case because this is a stockholder's derivative action. Yet, this Court and other courts have recognized that stockholder's derivative actions serve a useful purpose and should be encouraged. *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966); *Mills* v. *Electric Autolite Co.*, 396 U.S. 375, 396 (1970); *Denney* v. *Phillips & Buttorf Corp.*, 331

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the time and expense involved in litigating these actions, which have already been pending for approximately 3 years, may be inordinately increased.

F.2d 249, 251 (6th Cir. 1964). Such actions would hardly be encouraged if they were made more expensive and time consuming to prosecute.

Petitioners have cited a few decisions, e.g. *Essex Universal Corp.* v. *Yates,* 305 F.2d 572 (2nd Cir., 1962), in which the court has noted the problems involved in discharging its duty under *Erie* to decide questions of state law. The fact that this problem is sometimes difficult hardly means, however, that federal courts should be free to avoid their responsibilities under diversity jurisdiction to decide such questions in the absence of "special circumstances" which would warrant abstention and reference of said question to the state court for determination. See *Meredith* v. *City of Winter Haven, supra; McNeese* v. *Board of Education, supra;* and *Propper* v. *Clark, supra.*

In support of their argument that certification should be broadly permitted, petitioners also cite a few cases, e.g. *Kaiser Steel Corp.* v. *W. S. Ranch Co., supra,* where the state court came to a different conclusion on a question of state law after the federal court had determined the issue. While this may occasionally happen, it hardly justifies adopting a rule which would clearly undermine the principles of diversity jurisdiction and would make the prosecution of diversity cases much more expensive and time consuming.*

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* It should be noted that there are also occasions where the state court benefits in subsequent cases from a carefully reasoned opinion by the federal court on an issue of state law. See Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals"*, 73 Yale L.J. 850, 864 (1964); Liebenthal, *A Dialogue on England,* 18 W. Res. L. Rev. 157, 194 (1966). Moreover, the problem of a possible disparity between federal and state court decisions is no different than the problem which may result whenever a foreign forum interprets a state's law under conflict-of-law rules. See Note, 69 Yale L. J. 643, 660 (1960). Indeed if plaintiffs had brought the instant cases in the state court of New York, that court would have had to determine what Florida law was and to apply that law to this case.

Petitioner Simon argues that certification is necessary to prevent forum shopping. In support of his contention, he suggests that the plaintiffs brought their actions in New York's federal court to get the benefits of the decision of the New York Court of Appeals in *Diamond* v. *Oreamuno*, 24 N.Y. 2d 494, 248 N.E. 2d 910, 301 N.Y.S. 2d 78 (1969). Yet, in fact, the *Gregorio* case was instituted in the Northern District of Illinois and was transferred to the Southern District of New York with the consent of the defendants and the *Schein* case was brought in the *Southern* District of New York because plaintiff Schein's counsel were located there and jurisdiction could be obtained there over most of the parties. Furthermore, if the plaintiffs were concerned about getting the benefit of the *Diamond* case, they could have brought this action in the New York state court from which certification is not available. Petitioners' statement that the decision by the Court below in this case will result in a flood of diversity cases in the Second Circuit involving trading with confidential corporate information in the stock of Florida corporations is without foundation. What is much more significant than the "problem" of forum shopping which the petitioner refers to (which is largely eliminated by the application of the principles of *Erie R. Co.* v. *Tompkins, supra*) is the danger of "eleventh-hour forum shopping" which occurs when parties, like the petitioners herein, have lost in the federal court and then seek to gain access to the state court to relitigate the issues. See Mattis, *supra*, 23 Miami L. Rev. at 732.

Finally, petitioners contend that this Court should broadly permit certification because diversity jurisdiction detracts from the time and resources of the federal courts to deal with more important matters. Thus, petitioners reveal the paucity of their arguments by urging this Court to, in effect, base its determination in this case on consid-

erations which are the business of Congress rather than this Court. See *Louisiana Power & Light Co.* v. *City of Thibodaux, supra* (dissenting opinion) where Mr. Justice Brennan, in discussing diversity jurisdiction, noted:

> "The roots of that jurisdiction are inextricably intertwined with the roots of our federal system. They stem from Art. III Section 2 of the Constitution and the First Judiciary Act, the Act of 1789 1 Stat. 73, 78.
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> Until Congress speaks otherwise, the federal judiciary has no choice but conscientiously to render justice for litigants from different states entitled to have their controversies adjudicated in the federal courts. 'Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity jurisdiction,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine'. *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 337 (dissenting opinion)." 360 U.S. at 41-42.*

This Court has made it clear that there is a very narrow corridor through which a federal court may "escape" from its obligation to decide state law questions when federal jurisdiction is properly invoked. To accept the petitioners' contention that certification is appropriate in any case where there is an unsettled issue of state law would be to turn this narrow corridor into a wide canyon.

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* Footnotes omitted.

C. Assuming *Arguendo* That the Court of Appeals Had Some Discretion to Certify the Question of State Law in This Case, There Was No Abuse of Discretion by the Court of Appeals in Not Certifying the Question.

Assuming *arguendo* that the Court below had discretion in this case to determine whether to certify the issue of state law to the Florida Supreme Court, we submit that there was clearly no abuse of discretion by the Court below in deciding the merits of the case and not certifying the issue to the Florida Supreme Court. First of all, as we have shown, there were no "special circumstances" in this case which would warrant the federal court abstaining from a decision on the state law question involved in this case.

Furthermore, the failure of the petitioners to request certification or even to suggest the possibility of certification to the Court below until *after* the Court below had rendered a decision adverse to them obviously weighs heavily against any claim by the petitioners that the Court below abused its discretion in not certifying the question of state law in this case to the Florida Supreme Court.*

In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), this Court, in holding that the District Court did not err in determining not to abstain from a decision on the merits in the case, noted that "neither party requested it". 377 U.S. at 329.

In support of their new found view that the Court below should have certified the question to the Florida Supreme Court, petitioners rely upon several cases in which

* Indeed, we submit that whatever "rights" petitioners may have had to have the issues of Florida law in this case certified to the Florida Supreme Court instead of having them decided by the Court of Appeals for the Second Circuit were waived by petitioners when they argued the merits of the case to the Court below and never even raised the question of certification. See Point D, *infra*.

the Court of Appeals for the Fifth Circuit followed that option. The fact, however, that the Fifth Circuit sometimes uses the Florida certification procedure* hardly demonstrates that the Court of Appeals for the Second Circuit abused its discretion in not certifying the question in this case, where there were no "special circumstances" present and none of the parties requested certification.

Petitioners contend that certification of unsettled questions of state law is necessary in the interests of fairness to the litigants. Yet it is difficult to understand how petitioners can seriously claim that the failure of the Court below to certify the questions of state law in this case was unfair to them when they never asked the Court below to certify the question or to do anything other than decide the issue on the merits.

It should be emphasized that the issue before this Court is not, as petitioners would have it, whether this Court agrees with the general proposition that the Florida certification procedure may be a useful device in those cases where abstention is appropriate, but rather whether the

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* It should be noted that the Florida certification procedure has been regarded by the Fifth Circuit as a purely discretionary procedure. *Trail Builders Supply Co.* v. *Reagan*, 409 F. 2d 1059, 1061 (5th Cir. 1969). While the Fifth Circuit has often chosen to use this optional procedure, it has also on several occasions decided not to use it and to determine unsettled issues of Florida law itself. See e.g. *Weitzner* v. *United States*, 309 F. 2d 45 (5th Cir. 1962) (Court construes homestead provisions of Florida's constitution); *Hamilton* v. *Maryland Casualty Co.*, 368 F. 2d 768 (5th Cir. 1966) (Purely local dispute as to the meaning of an insurance contract; the court declined to certify the question even though it admitted that the state court might have been better able to resolve the issue; in deciding the issue, the court looked to the case law of 12 states); see also *Motor Vehicle Casualty Co.* v. *Atlantic National Insurance Co.*, 374 F. 2d 601 (5th Cir. 1967); *Greer* v. *Associated Indemnity Corp.*, 371 F. 2d 28 (5th Cir. 1967); *Pacific Indemnity Co.* v. *Broward Co.*, 465 F. 2d 99 (5th Cir. 1972); *Habecker* v. *Young*, 474 F. 2d 1229 (5th Cir. 1973).

Court below erred by deciding the merits of this case and not using the certification procedure where the parties argued the merits of the case to the Court and the petitioners never even suggested the possibility of using certification until after they received an adverse decision on the merits.

We submit that assuming *arguendo* the Court below had any discretion to certify the question of state law in this case to the Florida Supreme Court, there was clearly no abuse of discretion by the Court below in not certifying the question and in deciding the case on the merits.*

D. The Petitioners Waived Their Right to Object to the Fact That the Question of State Law in This Case Was Not Certified to the Florida Supreme Court Since They Argued the Merits of the Case to the Court of Appeals and Did Not Request or Even Suggest the Possibility of Certification Until *After* the Court of Appeals Had Rendered an Adverse Decision on the Merits.

We submit that whatever "rights" petitioners may have had to have the issues of Florida law in this case certified to the Supreme Court of Florida instead of having them decided by the Court of Appeals for the Second Circuit surely must have been waived by petitioners when they argued the merits of the case to the Court below and never even raised the question of certification. See *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).

In *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), this Court (in a reverse situation) indicated that where a party, like the petitioners herein, freely litigates his claims in one court even though

* Since Judge Kaufman referred briefly in his dissenting opinion to the possibility of certification, it is reasonable to assume that the Court below considered the matter and determined that certification would not be appropriate in this case.

he may not be required to do so, he should not be allowed to ignore an adverse decision and start all over in another court. This Court said, at pp. 419-20:

> "But we see no reason why a party after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would * * * countenance an unnecessary increase in the length and cost of the litigation; * * *. We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then— * * * he has elected to forego his right to return to the district court."

In the instant case, the petitioners did not ask the Court below to certify the question. On the contrary, they argued the merits of the case to the Court and in effect asked the Court below to decide the case. Under these circumstances, they should not now complain that the Court below did what they, in effect, asked it to do. *Milliken* v. *Meyer*, 311 U.S. 457, 461 n.8 (1941); *Mercer* v. *Theriot*, 377 U.S. 152, 154 (1964); *F. W. Woolworth* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 231 (1952); *Hampson* v. *Bucyrus-Erie Co.*, 474 F.2d 562 (3rd Cir. 1972); *Glassman Construction Company* v. *United States*, 421 F. 2d 212 (4th Cir. 1970); *National Utility Service, Inc.* v. *Whirlpool Corp.*, 325 F. 2d 779, 780 n.3 (2nd Cir. 1963); *Orenstein* v. *United States*, 191 F. 2d 184, 193 (1st Cir. 1951) 5 C.J.S. Appeal & Error §1501. In *Glassman, supra*, the Court said, at p. 215:

> "We think Glassman is precluded from complaining of errors invited by it on the previous appeal.* See 5 C.J.S. Appeal & Error §1513 (1958).

* Footnote omitted.

Glassman strongly urged our duty to decide the issues of estoppel and payment on the prior appeal. It should not be heard now to complain that we did what it asked of us."

See also Note, 12 William and Mary L. Rev. 627 (1971) where the author states at p. 640:

"• • • The federal court might deem waived the right of the litigants to certify a question in the absence of a motion for certification *before* the court rules on the matter of state law." (emphasis supplied).

Finally, where a litigant objects to having an issue decided by a particular Judge or Court, he cannot wait until after an adverse decision has been rendered before raising his objection. *Laughlin* v. *United States,* 151 F. 2d 281 (D.C. Cir. 1945), cert. denied 326 U.S. 777 (1945); *In Re United Shoe Machinery Corp.,* 276 F. 2d 77 (1st Cir. 1960); *Pacheco* v. *People,* 300 F. 2d 759 (1st Cir. 1962); *Arnold* v. *McGuinness,* 289 F. Supp. 210 (N.D. Cal. 1968), aff'd. 400 F. 2d 392 (9th Cir. 1968), cert. denied 394 U.S. 918 (1969). As the Court of Appeals for the First Circuit stated in *United Shoe, supra* at 79, in an analogous situation involving a motion for disqualification of a judge:

"One of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification can not be permitted to wait and decide whether he likes subsequent treatment that he receives. As was said in State ex rel. Shufeldt v. Armijo, 1935, 39 N.M. 502, at page 506, 50 P.2d 852, at page 855,

"A litigant cannot experiment with the judge presiding over the case • • •.

> "* * * We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge."

We submit that the petitioners' claim that the Court below erred in not certifying the issues of Florida law in this case even though there were no "special circumstances" present, coming as it does only after petitioners "tested the water" and found it not to their liking, clearly should be rejected.

CONCLUSION

The Judgment of the Court of Appeals for the Second Circuit Should Be Affirmed.

Respectfully submitted,

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